

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 01

FLIGHT SERVICES & SYSTEMS, INC.)	
)	
and)	CASE 01-CA-183911
)	01-CA-189755
SERVICE EMPLOYEES INTERNATIONAL)	01-CA-194600
UNION LOCAL 32BJ)	
)	

BRIEF IN SUPPORT OF RESPONDENT’S MOTION TO STAY PROCEEDINGS
AND TO CONTINUE TRIAL

By way of background, FSS, through its parent company, International Total Services, Inc., has previously been held to be subject to the RLA. In *International Total Services* cases, 9 NMB 392 (1982), 11 NMB 67 (1983), 16 NMB 44 (1988), 20 NMB 537 (1993), 24 NMB 18 (1996), and 26 NMB 72 (1998), the National Mediation Board (“NMB”), looking at ITS’s operational arm, FSS, found, in each case, at airports throughout the United States, that ITS is subject to RLA jurisdiction. However, beginning in approximately 2013, the NMB, without explanation, rationale or reasoned decision, departed from its precedent with regard to the application of its “function and control” test, by placing an almost exclusive emphasis on the ability of a carrier exercise a substantial degree of control over the firing and discipline of a company’s employees.

ABM Onsite Servs.-West, Inc. v NLRB, 849 F.3d 1137, 1144. (D.C. Cir. 2017). *ABM* did not overrule or vacate post-2013 decisions of the NMB and NLRB, which applied the more restrictive test requiring that a carrier must exercise a substantial degree of control over firing and discipline of a company's employees before the agencies would find that company was subject to the RLA. *Id.* at 1144. The Court *did*, however, expressly find, at 1142:

This case turns on the fundamental principle that an agency may not act in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a). The NLRB has violated that cardinal rule here by applying a new test to determine whether the RLA applies, without explaining its reasons for doing so. *Because an agency's unexplained departure from precedent is arbitrary and capricious, we must vacate the Board's order.*
(Emphasis added)

Thus, the post-2013 decisions, all of which are relied upon by the General Counsel in its brief in opposition, and all of which apply the unexplained standard which the D.C. Circuit found to "arbitrary and capricious" cannot be relied upon. While *ABM Onsite Servs.-West, Inc.*, did not expressly overrule those decisions, unless and until a reasoned basis for applying the post-2013 rationale is supplied by either the NMB or the NLRB, to rely upon them is to invite reversal. Thus, in *ABM*, the D.C. Circuit found that the NLRB, also without reasoning or explanation, adopted the new, unexplained standard. The court then remanded the matter to the NLRB to "provide some explanation justifying the new test or to identify another agency that could." *Id.* at 1147.

Here, both the NLRB and the Union have, in their Briefs in Opposition, relied almost entirely on the post-2013 test. Moreover, the General Counsel has made it clear that it intends to try the issue of jurisdiction and has issued subpoenas to FSS officers and

customers seeking testimony and documentation bearing on the issue of control. Until recently, moreover, the NLRB had not taken any steps – at least not publically – to comply with court’s remand and explain the new standard.

However, within the past week, in *ABM Onsite West, Inc.* (Cases 19-RC-144377, 19-CA-153164), a letter from the NLRB to the NMB has been posted on the NLRB website in which the NLRB does refer the task of explaining the post-2013, as required by the Court of Appeals. A copy of this referral letter is attached hereto as Exhibit A. The NMB, as of this date, has not, to Respondent’s knowledge responded to this letter. (One assumes that if it had, the General Counsel would have of course mentioned such a response in its brief in opposition to Respondent’s pending Motion for Summary Judgment).

In short, it makes little sense to proceed with the trial in this case where the standard to be applied to the facts underpinning Respondent’s primary affirmative defense, i.e., whether the Flight Services & Systems, Inc. is subject to the jurisdiction of the NMB and to that of the NLRB, has yet to be determined by any tribunal. Such a determination will only be made when the NMB adequately responds to the NLRB’s recently revealed request. As matters stand now, neither the parties nor the Board is in a position to determine what test to apply to the facts presented on the issue of NLRB jurisdiction, and such a trial might well be a significant waste of judicial resources. For this reason, Respondent FSS moves that this court stay the proceedings and continue the trial in this action pending the NMB’s response to the NLRB letter of May 15, 2017 and the results, if any, of further action by the courts in the *ABM* case.

Respectfully submitted,

/s/ Timothy A. Marcovy
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**UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
1015 Half St., S.E.
Washington, D.C. 20570-0001**

May 18, 2017

Ms. Mary L. Johnson
General Counsel
National Mediation Board
1301 K Street, NW -- Suite 250 East
Washington, DC 20005-7011

Re: ABM Onsite Services - West, Inc.
Cases 19-RC-144377, 19-CA-153164

Dear Ms. Johnson:

The above-captioned proceeding is currently pending before the National Labor Relations Board. In the underlying representation proceeding, the NLRB, over then-Member Miscimarra's dissent, concluded that, under recent National Mediation Board decisions, the Employer is not subject to the Railway Labor Act. In *ABM Onsite Services - West, Inc. v. NLRB*, 849 F.3d 1137 (D.C. Cir. 2017), the court remanded the case to the Board, holding that the NMB cases on which the NLRB's representational decision relied represented a departure from longstanding NMB precedent.

Consistent with the court's opinion, the Board respectfully requests that you review the record and provide the NLRB with your opinion as to whether the NMB has jurisdiction over the Employer. In doing so, we request that the NMB address the concerns expressed in the court's decision.

The issues are set forth in the various attachments, including the D.C. Circuit Court's opinion, the Regional Director's Decision and Direction of Election in the underlying representation case, and the transcripts and exhibits from the hearings held in the NLRB representation proceeding. Should you require further information about the record in the representation proceeding, please contact Mr. Ronald K. Hooks at (206) 220-6310.

The Board would appreciate your opinion in a form appropriate for citation or quotation in any decision the NLRB may subsequently issue. It is respectfully requested that the enclosed formal documents be returned with your opinion.

EXHIBIT A

Sincerely,

A handwritten signature in dark ink, appearing to read "S. Leverone", with a long horizontal flourish extending to the right.

Susan Leverone
Associate Solicitor

Enclosures

cc: Mr. Gary Shinnars
Mr. Ronald K. Hooks

CERTIFICATE OF SERVICE

A copy of this Brief in Support of Respondent's Motion To Continue Trial and Stay Proceedings was served electronically, through the NLRB's electronic filing system, on all parties of record and their counsel. Copies were also served by Regular US Mail, postage pre-paid, upon all parties of record and their counsel, this 25th day of September, 2017.

/s/ Thomas P. Marotta

Thomas P. Marotta